Supreme Court, U. S.
FILED
JAN 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 77-6673

* * *

ZACKARY C. BROWN,

Appellant

V.

THE STATE OF TEXAS,

Appellee

* * *

On Appeal From The County Court At Law No. 2
El Paso County, Texas

* * *

BRIEF FOR APPELLEE

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant
Attorney General

RENEA HICKS
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3281

Attorneys for Appellee

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ZACKARY C. BROWN,

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On Appeal From The County Court At Law No. 2
El Paso County, Texas

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BRIEF FOR APPELLEE

* * *

OPINION BELOW

There is no opinion by the court below.

JURISDICTION

The judgment of the county court at law was entered on February 1, 1978, adjudging Appellant Brown guilty of the charged offense and assessing a fine of forty five dollars plus court costs. (A. 6). The fine not exceeding one hundred dollars, the county court at law was the highest court of the state in which a decision could be had, art. 4.03, Texas Code of Criminal Procedure, and an appeal was taken directly to this Court, where jurisdiction rests upon 28 U.S.C. Section 1257(2).

QUESTIONS PRESENTED

I. Whether Section 38.02(a) of the Texas Penal Code on its face unconstitutionally infringes upon freedom of expression protected by the First Amendment?

II. Whether Section 38.02(a) on its face is violative of the Fourteenth Amendment's Due Process Clause because it is unconstitutionally vague?

III. Whether Section 38.02(a) unconstitutionally infringes upon privacy rights protected under the Fourth Amendment?

IV. Whether Section 38.02(a) infringes upon the Fifth Amendment's privilege against compulsory self-incrimination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 38.02 provides:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech. . .

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in part:

> No person. . .shall be compelled in any criminal case to be a witness against himself. . .

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall. . .deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT

This case is on direct appeal from the final judgment of conviction entered against Appellant Brown on February 1, 1978, in County Court at Law No. 2, El Paso County, Texas.

On a bright, sunny day in early December, 1977, shortly after noon, two uniformed officers of the El Paso Police Department were patroling in a high drug problem area of El Paso. (A. 23, 26, 29). The officers, who were in a patrol car, observed Brown, whom they had never seen before (A. 24), and another man walking near one another in an unpaved alley. (A. 23). The other man was wearing an overcoat and limping. (A. 23-24). When first observed by the officers, Brown and the other man were a couple of feet apart, walking away from each other. (A. 27). The officers turned into the alley and, as they approached the two men, gained the impression that Brown and the overcoated man had

either just been together or, until the officers' approach, had intended to be together.(A. 24).

After driving up the alley to the spot where Brown was, the officers got out of the car, approached Brown, and asked him his name and his reason for being in the alley. (A. 25). Initially, they received no response--not even an explanation from Brown of why he would not give his name (A. 25), although later he did indicate that he felt they had no reason to stop him. (A. 29). The officers asked Brown his name at least once more before arresting him (A. 25) and also asked him for his residence address, but he refused to give it. (A. 32). The record does not reflect that the officers requested Brown to provide documentary identification. Brown was arrested for violation of Section 38.02(a)[1], and transported to the police station for booking. (A. 31). On the way to the station, Brown gave his name. (A. 32).

Brown was tried without a jury in Municipal Court No. 3 of the City of El Paso, Texas, found guilty, and assessed a fine of twenty dollars plus court costs. (A. 3). In accordance with Texas law, he sought and obtained a new trial in the county court at law, where he waived trial by jury and pleaded not guilty. (A. 6).

Prior to his trial on the merits, Brown presented a Motion to Set Aside Information, attacking the constitutionality of Section 38.02(a) on essentially the same grounds presented on this appeal. (A. 5). During the argument on the motion, which was denied (A. 20-21), Brown's counsel said that he assumed the officers "had some reason to make an initial stop and ask a question or so." (A. 18).

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[1]A violation of this statute is a Class C misdemeanor, *see* Section 38.02(b), Texas Penal Code, punishable solely by a fine not to exceed two hundred dollars, *see* Section 12.23, Texas Penal Code, and imposing no legal disability beyond the fine's imposition. Section 12.03(c), Texas Penal Code.

The only evidence offered at trial was the testimony of Officer Venegas, one of the two arresting officers. Brown's counsel made no objection to this testimonial evidence on the ground that it had been obtained in violation of the Fourth Amendment to the United States Constitution, and no motion to suppress was filed.

The county court at law adjudged Brown guilty and assessed him a fine of forty five dollars plus court costs. (A. 6). This appeal followed, and, on October 16, 1978, the Court noted probable jurisdiction. (A. 40).

SUMMARY OF ARGUMENT

Section 38.02(a) on its face implicates no First Amendment speech or expression issues. Brown's argument that mere isolated silence, without more, falls within the protections of the First Amendment is an absurd and unprecedented theory which ignores the constitutional text and the commonly understood usages of the English language. Given their most expansive reading, some cases have held that silence can be a form of protected First Amendment expression but only when the context of the silence indicates that it is an affirmation of an idea. Mere silence in the face of a law enforcement officer's lawfully asserted authority is not an expression of any idea--moral, religious, artistic, or political. Acceptance of Brown's theory of mere silence as speech would lead to unacceptable results and the consequent trivialization of the great purposes of the First Amendment. Even if First Amendment rights to expression were at stake, the state's interest in preventing crime through an intermediate level of response to street encounters would outweigh an individual's interest in expressing his silent contempt for otherwise lawful non-intrusive questioning.

Because Section 38.02(a) gives fair notice to persons of ordinary intelligence of what conduct it forbids and because its language does not encourage but discourages arbitrary and discriminatory enforcement

of the statute, it is not unconstitutionally vague. The phrase "lawfully stopped" which is attacked for imparting impermissible vagueness into Section 38.02(a) is derived from the Court's Fourth Amendment "stop and frisk" jurisprudence. In this jurisprudence, beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), the Court has grappled with the complex and diverse circumstances under which law enforcement officers and citizens confront one another on the streets and has set specific guidelines for such confrontations which are designed to objectify the Fourth Amendment standards implicit in those encounters and make them reviewable in the courts. One of the premises underlying the development of the "lawful stop" concept is that a law enforcement officer's conduct in street encounters can and must be subjected to judicial control in the interest of carrying out the mandates of the Fourth Amendment. The "lawful stop" standard is a way of denying unbridled discretion to a law enforcement officer in street encounters by setting guidelines as specific as possible, given the circumstances. The Court cannot find the phrase "lawfully stopped" unconstitutionally vague without admitting the futility of its efforts in *Terry* and its progeny. Such an admission is unnecessary since Section 38.02(a) sets a standard of conduct which is reasonably ascertainable and which, this Court must assume, will be enforced by the state courts of Texas when properly called upon to do so. If a stop is not lawful, there can be no violation of Section 38.02(a), assuming the issue is raised. Furthermore, Section 38.02(a) avoids the pitfalls of the vagrancy statutes which have been held unconstitutionally indefinite, because it focuses upon a citizen's conduct, not his status as those statutes tended to do. It is a precise effort to prevent crime, rather than a blunderbuss action aimed at intimidating "undesirables." It is framed to delimit a law enforcement officer's discretion, not make it limitless.

Although Brown has attacked Section 38.02(a) as an unconstitutional infringement upon privacy rights protected under the Fourth Amendment, he is foreclosed from raising the issue here by his actions or omissions in the trial court and by the fact that the rights cannot be asserted vicariously. No objections were raised to any trial testimony as having been obtained in violation of the Fourth Amendment, and, in fact, there is an apparent concession that no Fourth Amendment violation occurred. Even if the Fourth Amendment issue can be raised now, it is meritless. Since a person has no reasonable expectation of privacy in his name which he daily exposes to public and governmental scrutiny, no "search" was conducted by the officers in asking the contested questions. Even if the questions constituted a search, it was a reasonable one since they were non-intrusive and since Brown already had been lawfully stopped. A lawful stop necessarily carries with it the understanding that at least a rudimentary field interrogation of the sort sanctioned by Section 38.02(a) will follow.

The Fifth Amendment privilege against compulsory self-incrimination is a personal privilege and cannot be asserted vicariously on behalf of others. Therefore, Brown cannot attack the statute on its face as invading that privilege. Furthermore, since the record is devoid of any indication that Brown affirmatively invoked the privilege at any point in the proceedings, this Court should not address itself to the issue of whether the privilege was invaded. Even if the privilege had been invoked personally by Brown, his name and address would not have been incriminating in any way and, therefore, the contested questions required no incriminating response from Brown implicating the Fifth Amendment. A person's name and address are neutral items of information, communicating nothing about a person's guilt. They are analogous to blood samples in that they are neither testimonial nor

communicative in nature. Brown's self-incrimination argument must fail.

ARGUMENT

I.

SECTION 38.02(a) OF THE TEXAS PENAL CODE ON ITS FACE DOES NOT INFRINGE UPON THE RIGHT OF FREEDOM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

A. *Section 38.02(a) does not implicate any First Amendment freedom of expression issues.*

Brown argues that Section 38.02(a) is unconstitutional on its face because it punishes silence, which he suggests is a right protectable under the First Amendment's guarantee of freedom of speech and expression, made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *See, e.g., Lovell v. City of Griffin*, 303 U.S. 444 (1938). Because Brown has not demonstrated that silence in the face of an officer's questions is an expression of any moral, religious, artistic, or political idea, his argument must fail. Section 38.02(a) does not implicate any First Amendment speech issues.

Some decisions by this Court, given an expansive interpretation, can be read to hold that silence is a form of protected expression, but only in certain contexts not present in the instant case. In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court recognized the right of a person to refuse to support an ideology arguably espoused by the State through a slogan printed on its automobile license plates. Similarly, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court held that a compulsory flag salute and pledge law for children attending public schools

violated the First Amendment, because it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642. In neither of these cases, however, was mere silence held to be a First Amendment right. Rather, each case recognized that the protected silence must exist in a context which indicates that it is an expression of an idea. *Cf. Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (black arm bands expressing silent protest of Viet Nam war held protected symbolic expression). The record in this case is barren of any indication that Brown's silence was an expression of any idea, and Brown has not attempted to justify his silence as a principled refusal to support some state ideology. Furthermore, no fair reading of the statute can lead to the conclusion that it could ever be used to compel support for any idea. One's name and address, in themselves, signify nothing ideological, and a refusal to report them expresses nothing worthy of First Amendment protection.

Brown has failed to cite, and the state has been unable to find, any authority upholding the principle that silence, without more, is speech. There is good reason for this failure, since Courts do not readily endorse unsupportable theories. To define mere silence as speech would not only impart an Alice-in-Wonderland quality into the English language, letting words mean what people want them to mean, but also would undermine innumerable laws enacted to protect this country's citizens from crime, unscrupulous schemes, and dangerous products. Issuers of stock could justify refusals to provide the Securities and Exchange Commission with pertinent data as protected First Amendment silence. Manufacturers of products such as drugs could support refusals to provide consumers with information on dangerous side effects or on proper use

by reference to their First Amendment right to silence. These and other results flowing from Brown's theory reveal its poverty and absurdity. Such a trivialization of the significant and fundamental rights protected by the First Amendment is wholly unacceptable and unprecedented.

Brown's reliance on *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973), as the governing authority for his proposition that mere silence is speech is at best confusing and at worst wrong. In *Norwell*, this Court reversed the conviction of a man who had been stopped by a policeman while taking an evening walk, protested his being so accosted, and then been arrested and convicted for disorderly conduct. The Court found that, on the record before it, the state impermissibly had arrested and convicted the man for non-provocatively objecting to his detention. The man's speech, not his silence, was the heart of the matter. Thus, *Norwell*, the principal case on which Brown relies, presented an issue unrelated to the one presented in this case, and it can provide him no solace. No First Amendment rights are at issue here.

B. *On balance, the significant state interests furthered by Section 38.02(a) override any interests in freedom of expression it might affect.*

Even if the theory of mere isolated silence as speech were adopted, Section 38.02(a) would not be facially invalid. It is commonplace in First Amendment cases to note that the right of free speech is not absolute, *see, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). A balance must be struck between the competing public and private interests at stake. *Barenblatt v. United States*, 360 U.S. 109, 126 (1959). *See also Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). In the instant case, the balance tilts decidedly in favor of the state's interest in protecting its citizens from criminal

incursions upon their persons and property. Section 38.02(a) is an attempt by the state to allow its law enforcement officers to undertake at least a rudimentary investigation in circumstances creating a reasonable suspicion that a crime is being, has just been, or is about to be committed, but falling short of creating probable cause for an arrest. The statute eschews an all-or-nothing approach and adopts a policy favoring an intermediate response to situations raising suspicions of criminal activity. It avoids granting police a license to stop and question the state's citizens on mere whims and hunches. The sanctioned investigation potentially may either preempt the commission of a planned crime or lead to the apprehension of the perpetrator of a committed crime. In either event, the State's strong interest in preventing crime through an intermediate level of response to street encounters is evident. Balanced against this interest is the relatively insignificant interest of a lawfully stopped citizen in expressing his contempt for lawfully asserted authority through his silence in the face of that authority's non-intrusive questioning.

II.

SECTION 38.02(a) ON ITS FACE IS NOT UNCONSTITUTIONALLY VAGUE AND THEREFORE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A penal statute is unconstitutionally vague and, therefore, void under either the Fifth or Fourteenth Amendment's Due Process Clause if it " 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' " *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), quoting from *United States v. Harriss*, 347 U.S. 612, 617 (1954), or if it encourages arbitrary and

discriminatory enforcement. *Papachristou v. City of Jacksonville, supra* at 162. Section 38.02(a)[2] is not unconstitutionally vague under either of these tests.[3]

A. *Section 38.02(a) gives fair notice to persons of ordinary intelligence of what conduct it forbids.*

The portion of Section 38.02 which Brown argues imparts unconstitutional vagueness into the statute is the requirement that the stop of the person by the peace officer be a lawful one.

The term "lawful stop" is not a neologism coined by the Texas legislature, unanchored to the experience and understanding of the state's citizens and capable of

[2]*Humphreys v. State*, 565 S.W.2d 59 (Tex.Crim.App. 1978), the only reported Texas state court opinion to refer to the statute, did so only in unilluminating, general terms. With no authoritative state court construction of the statute, the Court must consider the statute as it is written. *Cf. United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971).

[3]Special concern and scrutiny are mandated when a statute attacked as unconstitutionally vague touches upon sensitive First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-14 (1972). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67 (1960) (suggesting that the doctrine and its application may best be explained as a way to prevent deprivation *sub silentio* of citizens' rights). Since no First Amendment rights are at issue, *see* Part I, *supra*, this part of the vagueness test is not applicable in this case. For the same reason -- the absence of First Amendment issues -- Brown's attack on the statute for facial overbreadth, in which he fails to note what First Amendment right is at stake, is misplaced. Overbreadth analysis, or more appropriately, substantial overbreadth analysis, is employed in the context of First Amendment rights, *Broadrick v. Oklahoma*, 413 U.S. 601, 611-18 (1973), to ascertain the potential chilling effect on protected expression of a given statute. It has no place in the analysis of general due process problems.

being attached to any event or series of events which might catch a law enforcement officer's fancy. It is, instead, a phrase firmly rooted in a line of recent Fourth Amendment decisions, beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), in which this Court has elucidated constitutional guidelines for "[s]treet encounters between citizens and police officers [which] are incredibly rich in diversity." *Terry v. Ohio, supra* at 13.[4] These decisions constitute an elaborate and painstaking effort by the Court to assure that the assertion of authority by the state over its citizens is subjected to as specific a standard as can be devised while leaving the law enforcement community with sufficient flexibility to do its job of securing the public peace. The aim of the development of the "lawful stop" concept has been to insure specificity and judicial control, abjuring vagueness instead of embracing it.

> "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Terry v. Ohio, supra* at 21 (footnotes omitted).

The importation of a constitutional norm developed to avoid vagueness and imprecision into a state penal

[4]The practice commentary following Section 38.02 also suggests these roots. *See* Vernon's Codes Annotated, Penal, §38.02, Practice Commentary.

provision, designed to give fair warning of what is prohibited, *see* Section 102(2), Texas Penal Code, cannot fairly be held to have infected that provision with unconstitutional indefiniteness. As the Court has written:

> "[The vagueness doctrine] is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

See also United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 578-79 (1973) (limitations in the English language...to being both specific and manageably brief...).

Brown argues, however, that, precisely because the Court itself has had disagreements during the development of the "lawful stop" concept, persons of ordinary intelligence cannot reasonably be expected to know what conduct is forbidden. *See* Brief of Appellant, p. 11. In essence, he argues that, since citizens cannot be expected to be constitutional scholars, they cannot be expected to realize when they are violating criminal provisions containing phrases rooted in constitutional law. This position must be rejected. First, it bears a strong resemblance to the proposition that ignorance of the law should be a defense to a criminal prosecution. Yet, courts and legislatures for the most part have rejected mistake of law as a defense. Weinreb, *CRIMINAL LAW, Cases, Comments, Questions* 416 (2d ed. 1975). Texas in particular has rejected such a defense except in circumstances not pertinent or not

raised here. Section 8.03, Texas Penal Code[5].

Second, the Court has twice before rejected vagueness attacks on a statute which referred to constitutional norms in defining a crime. In *Williams v. United States*, 341 U.S. 97 (1951), and *Screws v. United States*, 325 U.S. 91 (1945), a federal criminal civil rights statute, now 18 U.S.C. §242, which prohibited conduct under color of state law depriving persons of "rights, privileges, or immunities secured or protected by the constitution" was held not to be unconstitutionally vague. By the same reasoning, Section 38.02(a)'s use of the phrase "lawfully stopped," which refers to a constitutional standard, is not unconstitutionally vague. That a "willfulness" requirement was read into the statute in *Screws* does not make the cases' holdings any less binding in the instant case, since Section 38.02(a) contains the scienter requirement that a refusal to give one's name be intentional.

Part of the implicit rationale underlying these two cases' rejection of the vagueness attack is that otherwise vague terms acquire greater specificity from the historical context, including prior court decisions, from which they have developed. Other cases have used a similar approach. *See, e.g., Smith v. United States*, 431 U.S. 291, 308-09 (1977) (prior Supreme Court decisions aid in construction of obscenity statute); *Rose v. Locke*, 423 U.S. 48 (1975) ("crimes against nature" having developed meaning); *Parker v. Levy*, 417 U.S. 733 (1974) (military's general articles considered in historical

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[5]Also, for this reason, Brown's suggestion, *see* Brief of Appellant, pp. 10-11, that a layperson's misunderstanding of *Miranda v. Arizona*, 384 U.S. 436 (1966), can contribute to Section 38.02(a)'s alleged vagueness is irrelevant. *Miranda* disavowed its applicability to the situation here: "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." 384 U.S. at 477. *See also Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

context and held not unconstitutionally vague). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67, 84 n.83 and accompanying text (1960). Through accretion deriving from numerous pronouncements by this Court and lower federal courts in cases beginning with *Terry v. Ohio, supra*, Section 38.02(a)'s phrase "lawfully stopped," which in itself is an attempt to objectify Fourth Amendment analysis of street encounters, has acquired sufficient concreteness to provide "a reasonably ascertainable standard of conduct." *United States v. Powell*, 423 U.S. 87, 92 (1975).

In *United States v. Petrillo*, 332 U.S. 1 (1947), the Court recognized that otherwise vague statutes must be upheld if they are the products of necessity, especially when the complex activities being regulated make more precise language impossible. The phrase "lawfully stopped" is a product of such necessity since it derives from an attempt to describe permissible assertions of law enforcement authority in street encounters that are, in the already quoted passage from *Terry*, "incredibly rich in diversity."

Since the phrase attacked as vague is an attempt to make more specific and objective the review of encounters otherwise subject to vague and subjective determinations, since that phrase has acquired more definite meanings during the last ten years of federal court litigation, and since that phrase is the product of necessity, Section 38.02(a) provides fair notice of forbidden conduct to ordinary citizens[6].

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[6]Because this is an attack on the facial validity of Section 38.02(a), the "as applied" analysis of cases such as *Palmer v. City of Euclid*, 402 U.S. 544 (1971), is inappropriate. In fact, since no First Amendment freedoms are at issue here, *see* Part I, *supra*, and since an "as applied" attack has been eschewed, there is some question whether the vagueness claim can be pressed at all. In *United States v. Mazurie*, 419 U.S. 544 (1975), the Court noted that, without First Amendment freedoms at stake, vagueness challenges "must be examined in the light of the facts at hand." 419 U.S. at 550. *See also United States v. Powell*, 423 U.S. 87, 92 (1975).

B. *Section 38.02(a) does not encourage arbitrary and discriminatory enforcement.*

The Court cannot accept any argument that the phrase "lawfully stopped" in Section 38.02(a) encourages arbitrary and discriminatory enforcement without rejecting as futile the attempts it has made in cases beginning with *Terry* to regulate on-the-street police conduct in accordance with the mandates of the Fourth Amendment. As discussed above, the Court has grappled with "stop and frisk" cases beginning with *Terry* in an attempt to make the police conduct at issue reviewable by a detached, neutral body. The "lawfully stopped" concept embodied in *Terry* is an attempt to discourage the arbitrary and discriminatory enforcement of criminal laws. The use of that identical concept in Section 38.02(a) has a similar objective "to guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses..." Section 1.02(5), Texas Penal Code.

That Section 38.02(a)'s use of the term "lawfully stopped" was meant to discourage arbitrary exercises of law enforcement discretion obviously does not mean that such arbitrariness will not occur. If a Texas law enforcement officer wishes to harrass a person by unlawfully stopping and questioning him on various subjects, he can do so virtually unrestricted[7], whether or not Section 38.02(a) exists. Just as the exclusionary rule does not deter unlawful police conduct not directed towards obtaining valid convictions, the "lawful stop" standard in Section 38.02(a) cannot deter questioning by police officers not directed towards conducting a proper investigation. However, Section 38.02(a) does prevent

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[7]Of course, internal administrative discipline and civil tort actions are disincentives to improper police conduct.

imposition of criminal sanctions if the stop is not proper. Under Section 38.02(a), if the law enforcement officer did not lawfully stop the person charged with the crime, there cannot be a conviction, assuming the matter is raised at trial.

Section 38.02(a) is therefore fundamentally different from the type of vagrancy ordinance that was held unconstitutionally vague in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In *Papachristou*, the Court held that the total absence of standards governing the exercise of the discretion granted by the ordinance permitted and encouraged arbitrary and discriminatory enforcement. 405 U.S. at 170. On the other hand, Section 38.02(a)'s requirement that the stop be lawful sets a specific standard, established by the Supreme Court and reviewable by all courts, which, if not met, results in an acquittal for the criminal defendant. Thus Section 38.02(a) is unlike vagrancy statutes which tended to concentrate upon "what the man charged...*is* rather than what he does." Amsterdam, *Federal Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 Crim.L.Bull. at 205 (1967) (emphasis in original). Section 38.02(a) concentrates upon a person's acts, not his character. The only conceivable potential for misuse of Section 38.02(a) would follow not from any vagueness inherent in its language but from the refusal or failure of state courts to apply properly the Fourth Amendment requirements for lawful stops to the cases before it. Such a limited and remote potential provides no basis for finding Section 38.02(a) constitutionally infirm. This Court does not premise its constitutional law decisions on assumptions that state courts will not abide by the mandates of the United States Constitution. *Cf. Stone v. Powell*, 428 U.S. 465 (1976).

III.

SECTION 38.02(a) DOES NOT INFRINGE UNCONSTITUTIONALLY UPON ANY PRIVACY RIGHTS PROTECTED UNDER THE FOURTH AMENDMENT.

A. *Brown is foreclosed from raising the Fourth Amendment issue in this Court.*

During argument on his motion to set aside the information in which his client was charged with a Section 38.02(a) misdemeanor violation, Brown's attorney stated that he assumed the officers had some reason other than merely ascertaining his name for stopping and questioning Brown. (A. 18). While the statement may not clearly constitute an admission of the stop's lawfulness, it is suggestive of one and might have led the presiding judge to think that the stop's lawfulness was conceded, especially when taken in conjunction with the following factor. Additionally, and more importantly, Brown's attorney failed to move to suppress or object to any of the evidence presented against his client on grounds that it had been obtained in violation of the Fourth Amendment, which, under *Mapp v. Ohio*, 367 U.S. 643 (1961), is applicable to the states through the Due Process Clause of the Fourteenth Amendment.

Under settled Texas law, failure to object to the introduction of evidence obtained in an allegedly illegal search or seizure bars appellate review of the admissibility of the evidence. *See, e.g., Branch v. State*, 477 S.W.2d 893, 895 (Tex.Crim.App. 1972). This contemporaneous objection rule, which clearly would have been invoked by Texas' criminal appellate court had it been presented with the case, constitutes an adequate state procedural ground barring Supreme Court consideration of the issue on direct review if the

state rule serves a legitimate state interest. *Henry v. Mississippi*, 379 U.S. 443 (1965). In *Henry*, this Court recognized the legitimacy of the state interest in such a rule because it gives the trial judge an opportunity to conduct the trial without using the tainted evidence and increases the likelihood that new trials can be avoided, thereby contributing to the efficient use of judicial resources. 379 U.S. at 448. In *Henry*, however, on the record before it, the Court found that this purpose of the rule may have been served substantially by the defendant's motion for a directed verdict "*because of the erroneous admission of* [*an*] *officer's testimony.*" *Id.* (emphasis added). The motion for a directed verdict, which tends to be rather *pro forma* in criminal litigation, was sufficiently specific in that instance to perform essentially the same function as the contemporaneous objection rule. The analogous motion in the instant case was only a general one based on the insufficiency of the evidence. When taken in conjunction with the concession in the argument on Brown's motion, it could not have apprised the trial judge of what evidence was allegedly tainted (A. 32). Thus, the alternative method recognized in *Henry* of furthering the state's interest in its contemporaneous objection rule was not present. Therefore, Brown's failure to object to the admissibility of the officer's testimony on grounds that it was derived from an illegal search or seizure forecloses consideration of any Fourth Amendment claims on this appeal, including his privacy claims[8].

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[8]Brown may not press his Fourth Amendment claim before this Court for another reason. Both in the trial court and in this Court, Brown couched his Fourth Amendment privacy attack against the statute *on its face* in general terms, without attaching decisive importance to the facts of his case. Fourth Amendment rights being personal rights which cannot be asserted vicariously, *Alderman v. United States*, 394 U.S. 165 (1969), Brown's attempt to vicariously assert them on behalf of society at large must fail. *See generally Rakas v. Illinois*, ___U.S.___, 47 U.S.L.W. 4025, 5026-29, (U.S. Dec. 5, 1978).

B. *The officers' "search" of Brown by asking him his name and address after lawfully stopping him was reasonable.*

Insofar as the officers' asking Brown his name and address after lawfully stopping him can be termed a search within the meaning of the Fourth Amendment[9], it was a reasonable search which did not violate the strictures of the amendment, which only prohibits searches that are unreasonable. *Elkins v. United States*, 364 U.S. 206 (1960).

A prerequisite to the requirement that a person reply to an officer's queries about his name and address is that that person have been "lawfully stopped" by the officer. The officer must have had a reasonable, articulable suspicion that a crime had just been, was being, or was about to be committed, with the stopped person implicated in the process. *See generally Terry v. Ohio*, 392 U.S. 1 (1968); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

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[9]It is doubtful that a person who has been "lawfully stopped", *see, e.g., Terry v. Ohio*, 392 U.S. 1 (1968), harbors a "reasonable expectation of privacy," *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), in his name and address, which are facts constantly subject to governmental discovery by reference to information sources such as federal income tax withholding and reporting forms, drivers' license files, and property tax rolls. Like the physical characteristics of a person's voice, *United States v. Dionisio*, 410 U.S. 1 (1973), and his handwriting, *United States v. Mara*, 410 U.S. 19 (1973), a person's name and address are so constantly exposed to the public that no reasonable expectation of privacy remains, particularly for a person already lawfully stopped. Without this reasonable expectation of privacy, there is no search implicating the Fourth Amendment and, consequently, no need to demonstrate the reasonableness of the intrusion.

With the lawful stop as a prelude, the additional intrusions, if such they be, condoned by Section 38.02(a) are miniscule and, under the circumstances, eminently reasonable. *Cf. Pennsylvania v. Mimms, supra* (additional, incremental intrusion of asking person to get out of car after a lawful stop was *de minimis*). The inquiries are "reasonably related in scope to the justification for their initiation." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975), quoting from *Terry v. Ohio, supra*. The statute is intended to provide the police a reasonably sharply defined but non-Draconian way either to preempt the commission of a crime against persons or property or to apprehend the perpetrators of a recently committed crime if circumstances developing after the stop warrant it. When this Court sanctioned stops on less than probable cause in *Terry v. Ohio, supra*, it recognized the necessity and reasonableness of graduated levels of response by law enforcement authorities to situations suggesting that crimes might be afoot. Limited field interrogation of the type at issue here is a concomitant of the sanctioned stop, implicitly recognized in *Terry, see* 392 U.S. at 11-12. Later, in *Adams v. Williams*, 407 U.S. 143 (1972), this Court again addressed the problems arising from street encounters between citizens and law enforcement officers in situations where probable cause for arrest is absent. In *Adams*, the Court apparently recognized that, at the least, field interrogation concerning identity is a vital and integral part of a lawful stop:

> "A brief stop of a suspicious individual, *in order to determine his identity...*, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. at 146 (emphasis added).

See also United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975). Thus, this Court already has recognized

that questions as to identity which Brown challenges as invasions of his privacy protected by the Fourth Amendment are reasonable concomitants of lawful stops, and, therefore, the type of rudimentary field interrogation that is permissible under the Fourth Amendment.

Following *Adams v. Williams, supra*, lower court decisions on issues concerning the reasonableness of searches or seizures following a lawful stop suggest, often implicitly through their cursory treatment of the identity issue, how comfortably the questions sanctioned by Section 38.02 fit within the boundaries of the Fourth Amendment reasonableness requirement. For example, in *United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978), the court found the compelled reentry of a suspect into a bank for a brief inquiry was part of a lawful investigative stop sanctioned by *Terry* and *Adams*. In *United States v. Purry*, 545 F.2d 217 (D.C. Cir. 1976), the same circuit found proper under *Terry* and *Adams* a law enforcement officer's determining a suspect's identity, questioning the suspect, and even temporarily handcuffing the individual. In an opinion by Judge Friendly, the Second Circuit has found that an Immigration and Naturalization Service investigator's interrogation of stopped individuals to determine their identity and alienage fit within *Terry* and *Adams*. *United States v. Rodriquez*, 532 F.2d 834 (2d Cir. 1976). *See also United States v. Magda*, 547 F.2d 756 (2d Cir. 1976), *cert. denied*, 434 U.S. 878 (1977) (questioning of stopped individuals about what they had been doing was only a minor, lawful intrusion). In *United States v. Collins*, 532 F.2d 79 (8th Cir.), *cert. denied*, 429 U.S. 836 (1976), and *Dell v. Louisiana*, 468 F.2d 324 (5th Cir. 1972), *cert. denied*, 411 U.S. 938 (1973), the courts upheld as reasonable law enforcement officers' requests for identification, such as a driver's license, from the drivers of lawfully stopped cars. Of course, none of these

decisions binds this Court, but taken together, they indicate that the request for identification in the context of a lawful stop ranks very low on the scale of potential intrusiveness. These cases, as well as a common sense understanding of the realities of lawful investigative stops, further indicate that a recognition of the legitimacy of stops on less than probable cause carries with it the approval of at least a rudimentary field interrogation of the type at issue in this case. *See* LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 Mich.L.Rev. 40, 95 (1968) (*Terry* would make no sense if stops are permissible only to make identification). The questions authorized by Section 38.02(a) being reasonable in the context in which they occur, no Fourth Amendment privacy rights are denied[10].

IV.

SECTION 38.02(a) DOES NOT INFRINGE UPON BROWN'S PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION PROTECTED BY THE FIFTH AMENDMENT.

The Fifth Amendment's privilege against compulsory self-incrimination, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964), is purely a personal privilege, not assertable on

[10]Brown appears to disavow any reliance on a general due process right of privacy emanating in part from the Fourth Amendment, see Brief of Appellant, p. 20, but, insofar as the issue is raised, it is wholly without merit. If the publication and distribution of one's identity, including name and photograph, as a potential shoplifter following an arrest and dismissal of charges does not constitute an invasion of one's privacy, *Paul v. Davis*, 424 U.S. 693, 712-13 (1976), the mere disclosure of one's name and address to a law enforcement officer, without publication and distribution, certainly does not. *See also Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425, 455-65 (1977).

behalf of others. *United States v. Nobles*, 422 U.S. 225 (1975); *Rogers v. United States*, 340 U.S. 367 (1951). It must be affirmatively invoked before it may be claimed, *id.*, and, though the utterance of no talismanic phrase is necessary, its invocation must be such that the interrogator reasonably may be expected to be aware that the privilege is being claimed. *Emspak v. United States*, 349 U.S. 190 (1955).

In the instant case, Brown has failed to bring his refusal to answer the officers' questions about his name and address within the Fifth Amendment privilege because he has attempted, through attacking Section 38.02(a) on its face, to invoke the privilege not on behalf of himself, but vicariously on behalf of all who conceivably may be affected by the statute, and he has failed to point to any part of the record which indicates that he affirmatively invoked the privilege in such a way that the officers could have been aware that the privilege was being invoked.

Even if the privilege had been invoked personally by Brown, the record is devoid of any indication that his name and address would have been incriminating in any way. The privilege does not protect merely private information, but only that information which would be incriminating. *United State v. Nobles*, 422 U.S. 225, 233 n.7 (1975). In this regard, this Court has written:

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

On the record before this Court, nothing in the

implications or the setting of the questions about Brown's name and address suggests that answers would have proven injurious to him. Simply put, the statute required no incriminating response from Brown.

In *California v. Byers*, 402 U.S. 424 (1971), this Court held that a requirement that a driver of a motor vehicle involved in an accident stop at the scene and give his name and address to law enforcement officers does not violate the privilege against compulsory self-incrimination. In his plurality opinion joined by three other Justices, Chief Justice Burger wrote:

> "In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'" *California v. Byers*, 402 U.S. at 429 (plurality opinion of Burger, C. J.)

The opinion went on to note that there is nothing inherently incriminating about a person's name and address. 402 U.S. at 432.

These observations are pertinent to the instant case. Even had Brown personally invoked the privilege when he failed to give his name and address in response to the officers' questions, the privilege would not have been applicable. A person's name and address are neutral items of information which communicate nothing about the person's guilt.[11] In this sense, then, a person's name and address are analogous to blood samples in that they are neither testimonial nor communicative in nature, and, therefore, do not implicate the privilege. *See Schmerber v. California*, 384 U.S. 757 (1966). *See also Gilbert v. California*, 388 U.S. 263 (1967) (handwriting

[11]Though not present here, a situation conceivably might exist in which a person's true name, without more, might tend to suggest criminal culpability. The crime of forgery might be one example.

exemplars); *United States v. Wade*, 388 U.S. 218 (1967) (voice exemplars and exhibition of accused at post-indictment lineup); *Holt v. United States*, 218 U.S. 245 (1910) (modeling of blouse by accused). In fact, one's name and address in themselves communicate much less information regarding one's identity which might link one to criminal activity than these other types of information which have been held non-communicative and non-testimonial despite their utility in tying persons with certain characteristics to criminal events. A name and address signify nothing relating to criminality, and it is for this reason that Chief Justice Burger wrote that a name "identifies but does not by itself implicate anyone in criminal conduct." *California v. Byers*, 402 U.S. at 434. *See also* Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IowaL.Rev. 1093, 1117 (1967). Brown's self-incrimination argument therefore must fail for any one or all the reasons set forth above.

CONCLUSION

Section 38.02(a) of the Texas Penal Code is constitutional, and, the lawfulness of Brown's stop being either unchallenged by Brown or unreviewable by this Court under the circumstances of this case, the judgment of conviction should be affirmed.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant
Attorney General

RENEA HICKS
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3281

Attorneys for Appellee

January, 1979